



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, GITHINJI & WAKI, J.J.A.)

CRIMINAL APPEAL NO. 99 OF 2005

BETWEEN

TITUS MUTULU KIMOMO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ.)
dated 29th June, 2009

in

H.C.CR.A. NO. 138 OF 2000)

JUDGMENT OF THE COURT

The appellant was convicted by the Senior Principal Magistrate, Naivasha of the offence of robbery with violence contrary to **Section 296 (2)** of the *Penal Code* and sentenced to death. His appeal to the superior court against conviction and sentence was dismissed. This is a second appeal.

The particulars of the charge alleged that on 30th September, 1999, at Naivasha Township, the appellant jointly with others not before the court while armed with a pistol robbed **Humphrey Muchai Wageni** of cash Shs.300/= and a motor vehicle Registration No. KWV 664 valued at Shs.100,300/= and at or immediately before or immediately after the time of the robbery used actual violence on **Humphrey Muchia Wageni**.

The complainant **Humphrey Muchai** gave brief evidence at the trial. He was a taxi operator in Naivasha Township at the material time.

The description of the robbery in the complainant’s own words is as follows:

“On 30.9.99 at about 9.30 p.m. the accused came and asked me to take him to St. Peter’s Church. We talked over the charges and agreed at Ksh.1000/=. I called Chege to escort me. We proceeded

to the church. I had stopped at the gate when several men emerged from the church holding guns and hit the window. The accused came out and came to my side. He took the driver's wheel. I was the one engaging the gears. I cheated them that the prison was an estate. We drove towards the gate. I screamed for help while near the gate and prison warders fired in the air. The thugs came out running. I got hold of the driver who was next to me and called Chege. We overpowered him. Prison warders came and helped arrest the man”.

The complainant further testified in his evidence in cross-examination, among other things, that the appellant took his Shs.3000/=; that “the appellant took the wheel”; that the appellant was seated next to him; that the appellant punched him on the face while attempting to escape; that the appellant took his Shs.3,000/= and that the appellant had the Shs.3,000/= when he was arrested. **Samuel Chege Ngugi** (Chege) referred to in the evidence of complainant also gave brief evidence. He described the robbery, thus:

“I sat at the rear. We headed towards the prison bridge. The customer told Muchui to enter with a ward towards A.I.P.C.A. Church (sic). The customer told him to stop at the gate of the church. While the vehicle was stationary other people came from both sides. I tried to open the door. One of the men said shoot him. I was slapped and pushed into the vehicle. The customer had already come to the driving seat. He is the man at the dock. The driver was told to shift. I was ordered to lie down. I was hit severally on the head. Muchai was placed in the middle of two men. The men asked Muchai whether the road to prison was a highway he said yes. The men saw the prison gate. There was another vehicle parked beside the road. Muchai cheated the thugs that the gate to prison was an estate. We started screaming for help. The prison warders fired in the air. Muchai got hold of the accused and screamed. I went and helped him hold the man. Prison warders helped in arresting the man. He is before the court”.

A prison warder **Bernard Cheruyoit** (PW6) gave evidence at the trial in essence that he was on duty at the Naivasha Prison gate on the material date at about 10 p.m.; that motor vehicle Registration No. KMV 664 which was moving in a zig zag manner emerged from the direction of Town centre; that after hearing shouts of help he fired two rounds in the air and his colleague fired two more; that several men escaped; that he saw three men holding appellant and he and his colleague went there and helped in the arrest of the appellant and that police later searched appellant and found him with Shs.3,000/=.

Cpl. Charles Wesi of Naivasha Police Station testified at the trial that after the complainant reported the robbery to him, he went to the Naivasha prison where he found the appellant in the custody of prison warders and that they searched the appellant and recovered Shs.3,000/=.

Further, there was the evidence of **IP. Maurice Nzioka** who testified that the appellant self recorded a voluntary cautionary statement in English language before him which statement was produced at the trial after appellant said that he had no objection to its production.

The appellant stated at the trial that he was a trader at Nakuru and that he arrived at Naivasha from a funeral at Kinangop and when he failed to get a vehicle at the bus stage, he decided to sleep at his cousin's house and took a taxi to take him there. He continued:

“I took a taxi and when I was just on the verge of coming out we were attacked. The vehicle was driven towards prison gate. The attackers came out. The taxi driver said that I was among the thugs. Police were called and I was arrested and later charged with this offence. Ksh.300/= was found in my pockets. I was beaten by P.C. Mbaluka and others to tell them the whereabouts of the other thugs. I was not taken to show who my cousin was. I was later called to the office of the C.I.D. He wrote down some things and told me to copy what he had written. I refused because upon reading it I was confessing. As I was afraid I wrote as he instructed. I signed and I was charged accordingly”.

The trial magistrate considered the evidence and made the following finding; in his judgment delivered on 9th February 2000:-

“I found as a fact that the complainant was attacked by more than three people who were armed with pistols. As a result of this attack he sustained injuries as per the P.3 form filled by the doctor. It is not true as the accused alleges that he was an innocent passenger in the taxi. There is evidence from PW1 and PW2 to the effect that after the thugs attacked them, the accused went to the steering and was the one driving the vehicle. When he was later arrested he confessed to an inspector of police that he had taken part in the robbery. The statement was self recorded and he did not object to its production.

I find even without the confession that there is overwhelming evidence against the accused in this case”.

The superior court on its part after re-evaluating the evidence concluded; thus in its judgment delivered on 29th June, 2004:-

“First, we remind ourselves that we did not have the benefit of seeing the witnesses when they gave their evidence. The learned trial magistrate who saw the witnesses while they were testifying believed the evidence of pW2. We see no basis, in law, to disagree with the finding of the trial Magistrate. Furthermore, the evidence of PW2 was corroborated in every material particular by the other prosecution witnesses. It was therefore interesting to note that whilst the appellant was attacking the evidence of PW2, he did not complain about the credibility of the other witnesses, who also supported the evidence of PW2”.

There are nine grounds of appeal, but the first seven grounds were argued together. Principally, the appellant complains that, the charge sheet was defective; that evidence of identification did not meet the required legal standards; that it was doubtful whether or not the offence of robbery with violence was committed, that the circumstantial evidence and the doctrine of recent possession did not meet the required legal standards; and that the prosecution was conducted by unqualified prosecutor.

By **Section 361 (1) (a)** of the Criminal Procedure Code, a second appeal like the present one should be confined to points of law only. It is trite law that in a second appeal the appellate court will not interfere with concurrent findings of fact by the two lower courts unless it is apparent that on evidence no reasonable tribunal could have reached that conclusion (see **M’Riungu vs. Republic** [1983] KLR 455, **Karingo vs. Republic** [1982] KLR 213).

In **M’Riungu vs. Republic** (supra), this Court agreed with the views expressed in an English case:

“That where a right of appeal is confined to questions of law only an appellate court has royalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law”.

The law is also clear that an appellate court would not normally interfere with those findings by the trial court which are based on the credibility of witnesses unless, among other things, no reasonable tribunal could have made such findings (**Republic vs. Oyier** [1985] KLR 353).

It was submitted by the appellant’s counsel that the charge sheet was defective because the evidence of the complainant relating to the amount of money he was robbed of is inconsistent with the amount shown in the charge sheet. It is true that the charge sheet shows that the complainant was robbed of Shs.300/= and a motor vehicle. It is also true that complainant testified that he was robbed of Shs.3,000/= and that Shs.3,000/= was recovered from the appellant. The appellant himself stated that his Shs.300/= was taken. The superior court considered the discrepancy and made a finding that the inconsistency was not sufficient to upset the conviction because there was also evidence that the complainant was robbed of a motor vehicle. The fact that there was the discrepancy between the amount in the charge sheet and in the evidence of the complainant does not make the charge defective. It is apparent that the figure “3000” appears to be either a recording error or typing error as the appellant’s statement, that his Shs.300/= was taken is consistent with the amount stated in the charge sheet. In our view, the inconsistency does not render the entire evidence of the complainant relating to the robbery

incredible nor render the charge sheet defective.

It was further submitted that the incident occurred at night and that the evidence of identification of the appellant was mere dock identification and therefore weak. Regarding the evidence of the complainant and Chege that the appellant took the steering wheel, it was submitted that it was not clear from the evidence who of the two, the appellant and the complainant, was driving the vehicle upto the prison gate. We agree with the learned State Counsel that the issue of identification of the appellant does not arise in this case since the appellant admitted that he was in the complainant's vehicle at the time the robbers attacked them. The important issue is whether the appellant was among the robbers who robbed the complainant and commandeered the complainant's vehicle. The evidence of both the complainant and Chege leaves no doubt that the appellant took over the steering. According to the evidence of Chege, the complainant was told to shift and was placed between two men and the appellant went to the driving seat. According to the complainant, the appellant came out of the vehicle and took the steering wheel after the robbers hit the vehicle. As to whether the robbers commandeered the vehicle the superior court said:

“From the evidence on record, we hold the appellant and his colleagues had taken control of the motor vehicle from the complainant. They maneuvered (sic) (should have been manoeuvred) the vehicle to the direction which they were made to believe was an estate; but which turned out to be the Prison. By taking control of the vehicle, the appellant and his colleagues had deprived the rightful owner thereof, of the right to the use the vehicle as he wished. In a nutshell; they had stolen the vehicle”.

In our view, the prosecution case was not dependent on circumstantial evidence nor was the doctrine of recent possession applied. Rather, the prosecution case mainly depended on direct evidence that the appellant and other robbers robbed complainant of his money and motor vehicle and that he was apprehended while still inside the motor vehicle.

Lastly, the submission that the prosecution case was prosecuted by an unqualified prosecutor is not borne out by the record. The record shows that it is an Inspector of Police, IP. Karani who appeared at the time of the plea and who subsequently prosecuted the case. According to the law as it existed at the time of the trial, any police officer of the rank of an Assistant Inspector of Police and above was eligible for appointment as a public prosecutor.

It is clear, from the evidence of witnesses which we have deliberately reproduced, that the prosecution case depended on the factual evidence particularly from the complainant, Chege and Bernard Cheriuyot, the prison warder and also on the credibility of these three witnesses. The real question in the case was an issue of fact – whether the appellant was an innocent hirer of a taxi or whether he led the complainant and Chege to the robbers and himself participated in the robbery. The prosecution case was not based on any discernible point(s) of law like identification or circumstantial evidence.

The two courts below considered the evidence and made concurrent findings of fact associating the appellant with other robbers and also in the actual commission of the robbery. It has not been shown that either the trial court or the superior court misdirected itself in any material particular.

Indeed, there was credible and overwhelming evidence connecting the appellant with the robbery which coupled with the confession in the cautionary statement which was neither repudiated nor retracted before it was produced as an exhibit by **IP. Maurice Nzioka**, leaves no doubt that the appellant was convicted on strong evidence.

From the foregoing, we dismiss this appeal as being unmeritorious.

Dated and delivered at Nairobi this 4th day of June, 2010.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

I certify that this a
true copy of the original.

DEPUTY REGISTRAR